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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, D.C.

In the Matter of Proposed Changes) RM 10586
To the ITFS and MDS Rules) DA02-2732

COMMENTS OF MMDS LICENSEE COALITION

These Comments are filed in response to the Wireless Cable Association, International, National ITFS Association, and Catholic Television Network White Paper proposing radical changes in the current licensing scheme for MMDS and ITFS channels. The MMDS Licensee Coalition is an *ad hoc* group of MMDS licensees whose licenses would be dramatically impacted by the proposed rule changes.

The Coalition is strongly supportive of the aims of the White Paper. We recognize that the Paper represents a sincere attempt to devise a new spectrum allocation formula that will permit MMDS and ITFS channels to finally be used to their full potential. We urge the Commission to move forward as quickly as possible to implement a reallocation framework which effects many of the constructive changes put forth by the White Paper. We do not propose at this time to comment on the many minute technical details of the proposal because we believe that kind of analysis is best left to the Notice of Proposed Rulemaking stage. However, we do want to be sure that the Commission takes into account a number of important considerations as this process advances.

First, on a macro level, **the** Commission should be aware that the White Paper does not necessarily represent the views of many smaller MDS licensees. The White Paper presumably reflects what is best for the dominant members of WCA, the ITFS community and CTN but it largely ignores – or is even adversarial to – the interests of parties not at that table. Just as an

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example, ITFS licensees are very strongly protected from interference, ITFS licensees are reimbursed for the costs of transition, and system operators can opt out of transition plans, but MDS licensees are offered no reimbursement for enforced transition, have no right to opt out, and have considerably less interference protection than ITFS operators. It is obviously far easier to diminish the rights and property of someone who is not there to object. Having said that, we hasten to add that in many respects the Coalition does agree with the outline of the plan that has been devised, but in many other respects the plan does not acknowledge or accommodate the needs of MMDS licensees. We believe those needs can be fairly accommodated without doing serious violence to the plan as proposed, and we look forward to meeting with the Commission and the White Paper proponents to eliminate what we hope were unintended inequities. We therefore urge the Commission not to set the new licensing scheme in stone before all stakeholders have had an opportunity to be heard and to have input into the process. In this regard, there are several general concerns about the plan which merit further exploration.

Nation-wide transition. We have some concern that the benefits of transitioning to the new plan will be lost if the new channel plan is not adopted nation-wide in a fixed timeframe. Mobile usage of the MDS/ITFS channels is expected and should be highly encouraged. But mobile usage will be severely impaired if consumers cannot go to any market in the United States and have their equipment work with compatible system configurations. This was one of the key considerations which drove the Commission to adopt a single nation-wide cellular service free from most state-based obstacles. That policy was an unqualified success and should be followed here. Piecemeal implementation of the re-farming plan could also

significantly affect consumer acceptance of the service as well as the willingness of manufacturers to develop and mass-produce the equipment needed to make the plan work.

The White Paper envisions a cumbersome process where market by market transitions are effectuated with individualized plans in each market, complex reimbursement schemes, opt out provisos, 150-mile daisy chains, and other complications resulting from the voluntary market by market approach. The net result will be constant bickering over the terms of transition and who is responsible for what costs, *a* process which is likely to delay rather than expedite transition to the hoped for new order. The country would be left with a patchwork quilt of markets in different stages of transition, with different frequency bands being used for different purposes. This is the antithesis of the uniform spectrum plan which is needed to bring out the most efficient use of the MDS/ITFS band.

The entire transition/payment process (including the elimination of the most fertile areas of contention) would be infinitely simplified if all MDS and ITFS licensees were required to transition to the new plan by specified dates at their own expense. In most cases this would have no practical effect on ITFS licensees who lease their excess capacity to a system operator because that entity would bear the cost, just as it would under the current plan.¹ Since MDS licensees are already required to bear the costs of transition themselves under the current plan, there would be no effect on them. To avoid a disruptive flash cut, the transition could proceed *a la* cellular with the top 30 markets transitioning in year one, the next 60 in year two, and so on until all of the markets were transitioned. Transitions could occur earlier if all of the parties

¹ An ITFS licensee unsupported by a lessee would have to bear the minimal expense of re-tuning the single high power channel which it normally uses for educational operations to a new MBS frequency. Any other transition costs would await the involvement of a commercial operator, just as contemplated by the current plan.

to any market agreed. This option has the virtues of simplicity, uniformity, certainty and absence of all of the bones of contention buried in the White Paper. A number of the points discussed below would become moot if a simple nation-wide transition plan were adopted.

Payment issues. Assuming that something like the presently proposed plan is adopted, several financial issues would need further attention. First, the proponent of a transition in each market triggers a potentially costly transition which may involve relocation, new equipment, re-tuning and other costs. Given the recent shakeout in the telecommunications field, even once stable companies like WorldCom have fallen into financial distress. The transition procedures should ensure that a party triggering a transition by others will have the financial wherewithal to pay for the costs it has caused others to incur. In this regard, it should be noted that some proponents may not be licensees of the Commission and therefore may not be subject to effective enforcement action by the Commission. A mechanism ensuring that the Commission has the tools to enforce the obligations of the transition process should be devised.

Second, the plan as proposed calls for the Proponent of a transition plan to reimburse ITFS licensees for all costs involved in transitioning. By contrast, MDS licensees who may be equally unwilling participants in the particular transition plan proposed are required to pay all transition costs themselves. This is directly contrary to virtually every field of FCC regulation where the party triggering a spectrum and/or equipment change by another licensee for its own benefit is always required to assume the cost of that transition. This type of over-reaching is perhaps the best evidence that the White Paper does not fairly represent the views of the entire MDS industry. The Coalition would have no objection to having MDS licensees pay for the costs of re-tuning their transmitters to the new Middle Band channels, but any other costs should have to be paid by the Proponent.

Third, the Coalition is concerned about the provisions of the plan that call for non-participants in a given market's transition plan to pay for it. For example, an MDS licensee might go through the process of enforced transition to the plan formulated by someone else in the market. Not only would the MDS licensee have to pay its own transition costs, as noted above, but it would also have to pay for some *pro rata* share of *the* other transition costs when it went to use its own channels for its own purposes unrelated to the plans of the Proponent. The result is that the MDS licensee would have to pay for a plan which it neither wanted nor benefited by in any way, and which may even have undercut its own competitive efforts against the Proponent. A saner approach would be to absolve involuntary participants in a transition plan of any obligation to share in the costs of that plan. To avoid piggybacking by other licensees on the work paid for by an initiating Proponent, the Commission could make participation in the plan attractive so that licensees would have an incentive to join in. In any case, to the extent that MDS licensees have any obligation to pay for costs incurred by others, those costs would have to be fully documented, justified and detailed in advance to prevent abuse by a Proponent trying to pass off costs to other parties. Moreover, to the extent that an MDS licensee could accomplish the transition technical work on its own facilities better, less expensively or more efficiently than the Proponent, it should have that option.

Suspension of Interim Build-out and Operation Reaquirements. The Coalition heartily supports the proposal in the White Paper to relieve MDS and ITFS licensees of on-going obligations to construct and operate facilities under the current licensing regime pending transition to the new plan. It makes no economic sense whatsoever for licensees to make substantial investment in facilities which are likely to become extinct once the new rules are adopted. Similarly, it would be wasteful and disruptive of customer relations to institute new

services on these channels now only to reconfigure them entirely at some point in the near future. While it is unfortunate that the industry must once again “tread water” until the new rules are adopted, the record shows that the potential for the best and widest use of MDS/ITFS channels is in a configuration similar to that proposed by the White Paper. Transition to the new regime can be best accomplished by permitting licensees to shut down older facilities rather than continuing to build customer expectations which will have to be changed. Accordingly, the Commission should act immediately during the pendency of its consideration of the new rules to relieve MDS and ITFS licensees of the obligation to both build out new facilities based on the old rules and to continue to operate legacy facilities which will soon be obsolete.

On the other hand, once a transition is triggered, the Proponent of that plan should not be permitted to let the channels lie fallow. The Proponent of a plan causes significant cost and disruption to unrelated parties in the market where a transition is to occur, and such disruption should not be undertaken lightly. It would be anomalous indeed if a Proponent triggered a market transition based on proposed usage of only a few channels in a market. From an economic analysis, any scheme which imposes uneconomic costs on numerous parties with benefits to only one is irrational. A Proponent of a transition should be required to have at least half of the spectrum in a market either licensed, under lease, or consenting to its plan before a transition is triggered. This ensures that market transitions are not undertaken lightly and without regard to the effects on the whole market, that the transitioned channels will actually be used rather than warehoused, and that only a minority of licensees in any market will be forced into transitions against their will. At the same time, it avoids giving any individual licensee or licensees veto power over the transition of the market as a whole.

Safe harbor provision. The White Paper lays out a default plan identifying both the channel and bandwidth that would be assigned to each licensee in a market as a result of transition. The Coalition agrees that the participants in a market should be free to revise the default plan by agreement among themselves so that they can devise ways of using the spectrum even more efficiently. On the other hand, existing licensees need to have the basic comfort of knowing that a transition imposed upon them against their will will leave them in a position *no worse* than the default channel plan. The White Paper already calls for licensees to effectively give up 1.5 MHz of their spectrum as guard bands for the greater good. The Coalition recognizes the benefits of the plan and is generally willing to accept some diminution of its existing spectrum, but there must be limits. While the White Paper seems to assure licensees that they will be no worse off than the default provisions, it also appears that existing licensees can have their licenses nibbled away by losing up to 5% of their customer base, by having major amendments to their operating configurations imposed against their will (thus effecting potential reductions in their protected service areas)', and otherwise. It is important that all parties to the transition process know where they stand, and licensees should not have to yield even more bandwidth indirectly than they are already doing through direct guard band reallocations.

² For example, the White Paper provides that the Middle Band Spectrum will be adjacent high power channels. Presumably, the transmitters for these channels will have to be co-located in order to avoid adjacent channel interference. In most cases, this will mean that several channel groups will have to be relocated, an event which would normally result in a loss of protected service area or "GSA" in the White Paper's parlance.

Group secondary status. The White Paper calls for the I band channels to be secondary. No reason is offered for giving these channels secondary status, and none appears. They should be given equal status with all of the other channels involved to avoid making them effectively useless.

Existing contractual rights. Many ITFS licensees and MDS licensees have existing contractual commitments to lessees for five or ten years. The proposed channel reallocation will affect the ability of some licensees to deliver the spectrum they have obligated themselves to deliver and may also significantly affect payment amounts (up or down) in ways that no one anticipated.³ The Coalition does not have a proposal at this time for how *to* deal with this thorny problem, but the NPRM should recognize that there will be significant disruption to the extant ITFS and MDS leases, and it may be necessary to resolve their status generically rather through individualized litigation. Uncertainty would only delay the delivery of the benefits which this whole plan is designed to provide.

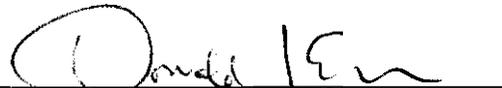
FDD channels. We also note that the White Paper attempts to be “technology agnostic” by making both FDD and TDD operations possible under the new arrangement. However, the plan puts all of the upstream FDD channels in the LBS portion of the spectrum allocated to ITFS licensees and all of the downstream FDD channels in the UBS. This means that a proponent desiring to use FDD would have to secure use of both the ITFS and MDS licenses, something that may be difficult to accomplish. This suggests that there may be some merit to

³ For example, many ITFS and MDS leases are based on per subscriber payments. In the new plan, channels might be used for administration, for guard bands, for upstream or downstream purposes, and for mobile customers with no relation to traditional residential or business video subscribers. We envision that these contracts would have to be re-negotiated since the authorized use of the channels would have changed radically since the contracts were signed.

putting some **part** of the reallocated ITFS spectrum in the UBS and, similarly, putting some portion of the reallocated MDS channels in the **LBS**. This adaptation would ensure that FDD Proponents will not be stymied simply because all of the ITFS or all of the MDS channels are committed to other purposes.

In closing, we reiterate our commendation of the WCA, the ITFS Association and CTN for taking a leading role in pulling together a plan that holds enormous promise to revitalize the wireless cable industry. We support that effort, but urge the Commission to treat the White Paper as a worthy first cut at what the final rules should be rather than a finished product. Once the legitimate perspectives of smaller MDS licensees are taken into consideration, we can have a new regulatory regime which treats everyone fairly and which offers everyone the opportunity to share in the advantages of the new channel plan.

Respectfully submitted,



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November 14, 2002

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